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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re DESTINY S. et al., Persons Coming
Under the Juvenile Court Law.

B163648
(Los Angeles County
Super. Ct. No. CK43389)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

KELLY B.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles. S. Patricia Spear,
Judge. Affirmed.

Craig E. Arthur, under appointment by the Court of Appeal for Defendant and
Appellant.

Lloyd W. Pellman, County Counsel and Lois D. Timnick Deputy County Counsel
for Respondent.

Kelly B., the mother of Destiny S., born in January 1999, and Carmen S., born in May 2000, appeals from the order made terminating her parental rights pursuant to Welfare and Institutions Code section 366.26. She contends the trial court erred when it found the exception contained in Welfare and Institutions Code section 366.26, subdivision (c)(1)(A) was not applicable.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On August 30, 2000, the Department of Children and Family Services, (the Department) filed a petition in juvenile court pursuant to Welfare and Institutions Code section 300, subdivision (b). It was alleged that the mother was a user of methamphetamines, which rendered her incapable of providing adequate care and supervision of the children. On August 25, 2000, she tested positive for methamphetamines. This drug use and conduct endangered the children's physical and emotional health and safety and placed them at risk of serious physical and emotional harm. It was further alleged the children's father had a history of drug use, which included the use of methamphetamines and marijuana and rendered him incapable of providing adequate care and supervision. On August 18, he tested positive for amphetamines.¹

In a detention report dated August 30, 2000, it was stated that on August 17, the social worker met with the mother and father in their home. The father was observed to have ankle bracelets on and confirmed he was under house arrest for possession and sales of methamphetamines. The mother acknowledged she knew the father was selling methamphetamines out of the home in March 2000. The father's probation officer confirmed the father was under house arrest for possession and sales of methamphetamines and possession of firearms and stolen property; and that the father had failed to show for his scheduled appointment to begin random drug testing. The

¹ Half siblings Amber S. and Derek S. are not the subjects of this appeal.

father had not been drug tested by his probation officer since his release from jail three weeks before.

The mother denied using drugs, stating she was breastfeeding. Drug test results from the father were positive for methamphetamines on August 18 and negative on August 23. Drug test results from the mother were negative on August 18 and positive for methamphetamines on August 22.

On October 18, 2000, the children were declared dependents of the court, removed from the parents and placed in the care of the Department for suitable placement. The Department was ordered to provide the children and parents with family reunification services and monitored visitation. The parents were ordered to participate in drug counseling, random drug testing and parenting education.

In the status review report dated April 18, 2001, it was reported that on January 1, 2001, the father had committed suicide in his home. The mother was participating in parenting education, individual counseling and drug counseling. Her counselor reported that her participation had been satisfactory, she had completed parenting education and had attended 10 education sessions; she had attended 11 individual counseling sessions; she also submitted to drug testing monthly from December 2000 through March 2001 and the results were negative. She, however, missed drug testing on approximately 10 dates during this time, even though she had been advised that a missed drug test was considered a positive test. It was reported that the mother was also drug testing at Poison Lab, Tarzana Treatment Center and she had missed four dates in October and November 2000. While the mother claimed she believed she was supposed to drug test at another location, the record indicated she did not submit to drug testing anywhere until November 16, 2000. At the time of the report, she had not completed drug counseling with weekly random drug testing. The mother was having weekly monitored visits with the children on Saturday and Sunday.

In a status review report dated October 17, 2001, it was stated that the mother had completed her parenting classes and received a certificate of completion. She had also completed an alcohol and drug rehabilitation program. The mother visited her children

twice a week in the maternal grandmother's home. The mother had not acknowledged that there ever was a drug problem. The social worker reported that on October 2, 2001, he made an announced visit to the mother's home and observed two unidentified males in the home and distinctly identified the smell of marijuana emanating from the door. It was recommended the mother's visits continue to be monitored, that the mother enroll in an after care program including Narcotics Anonymous and/or Alcoholics Anonymous and continue to submit to random drug testing. The Department recommended the children remain in suitable placement. The children's social worker recommended that because of drug usage in the mother's home and the mother's denial of a drug problem, that family reunification for the mother be terminated and that the matter be continued for a section 366.26 hearing.

In an Interim Review Report dated November 27, 2001, it was reported that on November 10, the social worker made an unannounced visit to the mother. The mother was preparing the children to go to the park and the children appeared to be doing well. It was reported the mother had been cooperative and complied with all court orders; she planned to attend an aftercare program and continued to submit to random drug testing with negative results. She had demonstrated insight into the problems that brought her family to the attention of the court and was willingly participating in counseling to address these issues; the social worker had made several unannounced visits to the mother's home and there appeared to be no child safety concerns. It was recommended that the Department continue to provide reunification services, that the mother participate in family preservation services and that the mother continue to have weekend unmonitored visitation with the children as well as extended visits including holidays in the home of the mother.

On November 27, the court found the mother in partial compliance with the case plan and placed 11-year-old son, Derek, in the care of his mother. The court stated it wanted to see the mother more firmly established in her aftercare drug program before returning the two younger children, Destiny S. and Carmen S., home to their mother.

In a Status Review Report dated March 25, 2002, it was reported that the mother's current behavior seemed to indicate an inability to provide the children with appropriate care and supervision. While in the care of his mother, Derek was ill in the school nurse's office and reported to be in a filthy condition. On numerous occasions the home was in a dirty and unsafe condition. Although the social worker had consistently urged the mother to attend an aftercare program and receive support from NA meetings, she had failed to avail herself of these services. In January 2002, the Department entered into a contract with a new vendor for random drug testing, which required witnessed testing. Since that date, mother had yielded two positive drug tests indicating ongoing methamphetamines usage. It was also reported that on March 12, the social worker went to the mother's home and found the owner of the house taking out the mother's furniture. The landlord reported that the mother had not paid rent for three months and her whereabouts were unknown. Derek had been placed in a foster home. The social worker received a call from the Long Beach Police Department and learned the mother had been arrested for auto theft.

The matter was continued to May 8, 2002. The report prepared for the May 8 hearing indicated the social worker had not yet received verification that the mother had enrolled in an aftercare program. Additionally, the mother had failed to present herself at toxicology laboratories on March 21, March 28, February 3, February 11, February 16, and February 25, 2002. It was reported that the mother had visits with the children on April 11, April 17, and April 25, 2002, and that Destiny and Carmen played with their half brother, Derek, and were very attached to him.

On May 8, the court found the mother had only partially complied with the case plan and return of the children to the mother would create a substantial risk of detriment to their safety, protection and well being. She was missing tests and was not consistent with her visitation. Family reunifications services for the mother were terminated and the matter was set for a hearing pursuant to Welfare and Institutions Code section 366.26.

The report for the hearing, dated September 18, 2002, stated that the mother had sporadic monitored visits with the children either in the Department's office or at a local

park. The children spent a lot of time playing and interacting with each other, and Carmen and Destiny appear to be very attached to Derek. Carmen was more independent and was able to play, paying little to no attention to her mother, while Destiny stayed close to her mother. The paternal grandmother expressed her wish to adopt Carmen and Destiny

In a Status Review Report dated November 6, 2002, it was reported that the mother had monitored visits in a local park on June 25, June 30, July 11, July 31, August 21 and August 26, 2002. The mother had no visits with the children in the month of September, and on October 9, the mother failed to show up for a visit.

On November 8, 2002, at the Welfare and Institutions Code section 366.26 hearing, the mother testified she had visited Carmen and Destiny “from the very beginning . . . visiting them at [her] mother’s house every weekend . . . until [her mother] moved. And . . . [she] still . . . visited them at least every other week.” The mother testified that from August 28, 1999, until March 2002, the maternal grandmother had visits at her home with Carmen and Destiny and the mother visited the girls there. The mother was at the maternal grandmother’s house “from the time they were dropped off.” The mother was not allowed to spend the night there, but she put the girls to bed. The children were dropped off either on Friday evening or Saturday morning and would be picked up on Sunday at 3:30 p.m. While the mother did not spend the night, she was with the children at all other times during the weekend. She always prepared the children’s meals and would also read books, watch movies, sing songs, go to the park and take walks. On Sundays, they would go to church, have picnics and read books. They would do a lot of different things, depending on the weather. Carmen and Destiny would only allow their mother to assist in potty training. Sometimes they would go and see Shakespeare in the park; the mother had a “park box” with books and toys to play with. She changed all of the diapers, gave the children baths and read bedtime stories.

In March 2002, the maternal grandmother moved, and the mother had weekends and overnights unmonitored with Destiny and Carmen. She would have the children from Friday, when Destiny would get out of school, until Monday when she would take

Destiny to school and Carmen home. She bathed and dressed the children, prepared their meals, put them to bed, sang songs and rocked them to sleep. She testified this occurred every weekend until Derek was removed from her home. She did not remember exactly how many weekends the children stayed with her but testified it was more than 10. Thereafter, she had monitored visits in the office either once a week or every other week. The Saturday before trial she had a visit from 10:00 until noon. They went to the park, played on the swings, picked flowers, made necklaces, played with “shapes” and found a ball. Destiny talked about her friends at school. The mother did not know the name of the school, as she had asked several times but gotten no response. The visit before was on a Wednesday, approximately one week earlier, at the home of the children’s great grandparents. They all played children’s games on the computer. The mother changed Carmen’s diapers. During a prior Saturday visit, they went to another park and fed the ducks, talked about them, picked up feathers and made headbands. The mother had a box filled with things to play with, including glue, crayons, paper, pencils, cassette tapes and a cassette player, that she brought with her on her visits. They also had a picnic lunch. The mother struggled to get time with the children since their paternal grandmother, with whom they were living, traveled a lot. When the mother picked the children up, the children were very excited and “squeal[ed].” When they were dropped off, both children cried, every weekend, every visit. She had monitored two-hour visits with the children for almost 10 months. At first the visits were monitored by the social worker. The mother would call every week and have visits every week or every other week. The mother felt the social worker was not “working with [her].” After approximately a month and a half, the mother was allowed to visit the children without the social worker. These visits were monitored by the maternal grandmother and took place approximately every couple of weeks unless the paternal grandmother was going out of town. She did not remember if she visited the children on more than one occasion in January or when the visit was. She did not remember how many visits she had in February or if she had more than one. She also could not recall if she had any visits in March. She testified she could not recall every date of every visit. On cross-examination she reiterated that initially the

children were going to her mother's house on the weekends and when her mother moved they started having visits at the Department's office. Prior to that she visited the children every weekend at her mother's. When they re-detained Derek on January 25, there was a change in visitation. She did not recall if she had visits with the children on February 19, February 28 or any visits with the children during the month of May. She recalled she was not permitted to see the children around their birthdays or all of May, because they were traveling with their paternal grandmother. She bought birthday presents and they sat wrapped on her counter for weeks. On cross-examination she testified she visited the children the Saturday before trial and "two Saturdays ago." She could not recall the dates, but knew she did not get enough time with her children.

The trial was continued to December 12, 2002, and Christina R., the maternal grandmother, testified she had an opportunity to visit with the children at the same time that the mother visited. Her last visit with the children was on November 2 and the mother was present. The visit was from approximately 12:00 to 2:00 p.m. They picked the children up from the foster parent's house and drove to a park, about a mile away. When the children greeted their mother, "they were gleeful, waving their arms around, and shouting 'mommy.'" She observed the mother interact with the children, taking a walk, talking about the flowers in the park, gathering flowers and making wreaths. They talked about the animals in the park and took the children to the restroom, and encouraged Carmen "to try." Christina R. brought juice and they drank juice; they played in the sand, gathered and played with leaves and played on the swings. The previous visit occurred October 19 for two hours and it included son Derek. When Destiny and Carmen saw their mother, they ran to her and clung to her shouting "mommy." The visit was at another park. They played in the sand area and sang songs. They prepared lunch and read books.

Christina R. testified that to the best of her recollection, the visit before that was in July 2002, when she alone visited the children. The mother did not participate. From January 2002 to July 2002, the visits were unsupervised and Christina R. was not present.

From July 2000 until approximately November 2001, Christina R. had weekend visits with the children and the mother came every day that the children were with her.

On cross-examination, Christina R. testified that her weekend visits ended a year before. Since July, she had visited the children three or four times and the mother was present all but once. Previous to July, the mother was seeing the children through the Department.

In terminating parental rights, the court observed it had no confidence that the mother was really drug free. There had been some positive tests this year. She had never completed an after care program. While she had maintained some visitation, it had been irregular. The court concluded that it could not find that the detriment to the children of discontinuing the parental relationship outweighed the benefit the children would have in a permanent placement. The court noted there was a conflict in the testimony of the mother and the Department's reports regarding the frequency of visitation, but there were large gaps in visitation. The court found by clear and convincing evidence that the children were adoptable and the care, custody and control of the children was transferred to the Department for adoptive planning and placement.

DISCUSSION

Appellant contends the affirmative evidence presented at the hearing met the burden in establishing the benefit exception found in Welfare and Institutions Code section 366.26, subdivision (c)(1)(A). She claims she had maintained a strong bond with all three children and was regular and consistent in her contact. We disagree.

“At the selection and implementation hearing the court must order one of three permanent plans for the dependent child -- adoption, legal guardianship, or foster care. Adoption is the preferred permanent plan. [Citation.] Freeing a child for adoption requires termination of parental rights. ‘[I]n order to terminate parental rights, the court need only make two findings: (1) that there is clear and convincing evidence that the minor will be adopted; and (2) that there has been a previous determination that reunification services shall be terminated.’ [Citation.]” (*In re Jasmine T.* (1999) 73 Cal.App.4th 209, 212.)

At all times relevant, under section 366.26, subdivision (c)(1), there were four exceptions to the rule.² Subdivision (c)(1)(A), which is the exception potentially applicable in this case, provides: “The parents or guardians have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.”

“Pursuant to section 366.26, subdivision (c)(1) absent one of four specific exceptions, the court must order adoption as the permanent plan for a child found likely to be adopted. [Citation.]” (*In re Jasmine T.*, *supra*, 73 Cal.App.4th at p. 213.)

“The statute does not define the type of parent-child relationship which will trigger the application of this exception. The court in *In re Autumn H.* (1994) 27 Cal.App.4th 567 . . . interpreted the exception to mean that ‘the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.’ (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) [¶] Courts have required more than just ‘frequent and loving contact’ to establish the requisite benefit for this exception. (See *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419. . . .) Interaction between natural parent and child will always confer some incidental benefit to the child. . . . The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to

² A fifth exception not applicable here was added by statute effective January 1, 2002. (Stats. 2001, c. 747 (Assem. Bill No. 705), § 3.)

parent.’ (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)” (*In Re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534.)

“The issue of sufficiency of the evidence in dependency cases is governed by the same rules that apply to other appeals. If there is substantial evidence to support the findings of the juvenile court, we uphold those findings. (*In re Brandon C.*, [*supra*,] 71 Cal.App.4th at p. 1534) We do not evaluate the credibility of witnesses, reweigh the evidence, or resolve evidentiary conflicts. Rather, we draw all reasonable inferences in support of the findings, consider the record most favorably to the juvenile court’s order, and affirm the order if supported by substantial evidence even if other evidence supports a contrary conclusion. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) The appellant has the burden of showing the finding or order is not supported by substantial evidence. (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420. . . .)” (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947.)

The record indicates that Destiny S. was removed from the custody of her mother when she was approximately a year and a half old and Carmen when she was approximately three months old. The mother’s participation in drug testing was sporadic, at times missing drug tests or testing positive. While she agreed to enroll in an aftercare program, apparently she never did. As the trial court observed there were large gaps in visitation. Early on, she visited her children often at the home of her mother and appeared to spend almost every waking hour with them. In March 2002, she had overnight unmonitored visits with the children on the weekends and spent her time preparing their meals, bathing and dressing them, and singing and playing with them. Arguably a significant and emotional relationship was developing between the parent and the children. Additionally, another child, Derek, not a subject of this appeal, was returned to the mother’s custody.

A short time later, however, Derek was removed from her care. The mother’s drug tests were yielding positive results, indicating ongoing methamphetamine usage and it was learned that Derek was ill and filthy and living in a dirty and unsafe home. The mother’s whereabouts became unknown and her visits with Carmen and Destiny

decreased and became monitored in the Department's office or the park. In September 2002, it was reported that while she had two-hour visits with Carmen and Destiny twice monthly in June, July and August 2002, she had no visits with the children in September, and on October 9 she failed to show up for a visit. She had two-hour visits with the children on October 19 and on November 2. Even though proceedings were continued from November 8 to December 12, she had no further visits with the children. The grandmother testified the mother's last visit with the children was on November 2.

Substantial evidence supports the findings of the court that the mother did not maintain regular visitation with the children. Additionally, the court's finding that the quality of their relationship did not establish the requisite benefit for the exception is supported by substantial evidence.

DISPOSITION

The order is affirmed.

MUÑOZ (AURELIO), J.*

We concur:

JOHNSON, Acting P. J.

WOODS, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.